OCBC BANK (MALAYSIA) BHD & ORS *a*

v.

LEE LEE FAH & ORS & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR *b*
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEALS NOS: N-02-698-1997 & N-02-699-1997]
8 OCTOBER 1999 *c*

CONTRACT: *Sale and purchase of land - Payment of purchase price - Stakeholder absconding with purchase money - Land registered in purchaser's name and charged to bank but vendor did not get paid - Who should burden loss - Whether purchaser or vendor - Whether chargee bank - Remedy for vendor - Whether only against stakeholder - Whether purchaser's title to land indefeasible - Whether bank's interest in land also indefeasible - National Land Code 1965, s. 340(1), (2)* *d*

LAND LAW: *Indefeasibility of title and interests - Sale and purchase of land - Stakeholder absconding with purchase money - Land registered in purchaser's name and charged to bank but vendor did not get paid - Remedy for vendor - Whether only against stakeholder - Whether purchaser's title to land indefeasible – Whether bank's interest in land also indefeasible - National Land Code 1965, s. 340(1), (2)* *e*

By two separate sale and purchase agreements, Koh Guan Industries Sdn Bhd ('the company') agreed to purchase two parcels of land ('the lands') from the respondents. Upon executing the agreements the company paid 10% of the purchase price as deposits for the purchase. The purchase was partly financed by the appellant ('the bank'), who, for that purpose and upon the security of charges created in its favour, remitted RM250,000 to Messrs. Francis Yong, Sulastry & Co, the stakeholders and the company's solicitors for the transactions. *f* *g*

The stakeholders, having registered the lands in the name of the company, and the charges in favour of the bank, absconded with the purchase money. The result was that the respondents were deprived of the balance of the purchase price and have also lost their titles to the lands. The respondents in the circumstances sued the company and the bank applying *inter alia* for a retransfer of the lands to them free from encumbrances. The learned trial judge held that: (i) the company was liable for the loss suffered by the respondents as the company was the one who had engaged the stakeholders; (ii) there was *h* *i*

insufficient consideration for the sale resulting in the transaction being unenforceable, and that being so, the company should retransfer the lands to the respondents and the charges in favour of the bank should be cancelled; and (iii) the bank could not be faulted nor be held liable for negligence. Dissatisfied with the decision, both the company and the bank appealed.

Held:

Per Shaik Daud Ismail JCA

[1] The position of a stakeholder in a sale and purchase agreement is clear. The purchaser, having deposited the money with the stakeholder, if he changes his mind, cannot demand the stakeholder to hand over the money to him without the consent of the vendors for whose benefit it was deposited. This is so even if the stakeholder is appointed by the purchaser.

[2] In this case, both the company and the respondents mutually agreed that the solicitors be made the stakeholders even though the solicitors were nominated by the company. By handing over the balance of the purchase price to the stakeholders, the company had done everything that needed to be done under the agreement. The company, in other words, had parted with the balance of the purchase price beyond recall to the stakeholders. The company, therefore, was under no duty to ensure that the money would actually be paid to the respondents.

[2a] The loss, consequently, must remain where it fell in the hands of the respondents vendors. Clearly, the respondents' remedy lies against the stakeholder. The learned judge was therefore wrong in concluding that the company must bear the loss simply because they had introduced the solicitors to the respondents.

[3] The bank is an innocent party and is therefore protected by s. 340(1) National Land Code 1965. The bank's interest as chargee is indefeasible unless there are evidence to their knowledge that there was fraud or misrepresentation or where the registration of the charge was obtained by forgery or where the title or interest was unlawfully acquired. There were no such evidence.

Per Siti Norma Yaakob JCA

[1] The contention that since the stakeholder was the company's own solicitors the company must therefore be liable to make good the loss suffered by the respondents is misplaced. We are here not concerned with the appointment of Messrs. Francis Yong, Sulastry & Co as the company's solicitors, but with their appointment as stakeholders, an appointment that had been mutually agreed to by the company and the respondents.

[2] The company had carried out all its obligations under the agreements. Likewise the respondents had honoured their obligations under the agreements, but unfortunately for them, they have not been paid in full. Under the circumstances, the respondents must look to the stakeholders to account and not to the company for such loss. For one, the stakeholders were legally bound to pay the balance of the purchase price deposited with them to the respondents once the transfers and charges over the lands had been registered. Secondly, the company was under no duty to ensure that the respondents would receive the money from the stakeholders.

[3] The learned trial judge had misdirected himself when ordering a retransfer of the lands to the respondents. The question of consideration, be it sufficient or otherwise, is clearly not in issue and the judge's finding that the agreements cannot be enforced does not at all arise. The fault all along lies with the stakeholders who were not parties to the agreements but have been appointed under the agreements to do certain act which they failed to do.

[4] Both the company and the bank have acquired indefeasible title to the lands by virtue of s. 340(1) NLC, the former as the registered proprietor and the latter as the chargee. The only way the titles and interests can be impugned is for the respondents to establish any of the circumstances in s. 340(2) as to render such titles and interests defeasible. This the respondents failed to do.

[Both appeals allowed; order of High Court set aside]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Melalui dua perjanjian jual beli berasingan, Koh Guan Industries Sdn Bhd ('syarikat') bersetuju untuk membeli dua keping tanah ('tanah') dari responden. Sebagai deposit untuk pembelian tersebut syarikat membayar 10% harga belian ketika memeterai perjanjian. Pembelian adalah dibiayai sebahagiannya oleh perayu ('bank'), yang, untuk tujuan itu dan atas jaminan gadaian yang dibuat bagi manafaatnya, telah membayar sebanyak RM250,000 kepada Messrs Francis Yong, Sulastry & Co, yang merupakan pemegang stake dan juga peguamcara responden bagi transaksi berkenaan.

Pemegang stake, setelah mendaftar tanah kepada nama syarikat, dan menyempurnakan gadaian bagi manafaat bank, telah melarikan diri bersama-sama wang pembelian. Akibatnya responden tidak mendapat baki harga belian serta hilang hakmilik ke atas tanah. Responden dalam halkeadaan sedemikian mendakwa syarikat dan bank menuntut antara lain supaya tanah diserahmilik kembali kepada mereka tanpa apa-apa sekatan. Hakim perbicaraan bijaksana

memutuskan bahawa: (i) syarikat bertanggungjawab atas kerugian responden kerana syarikat yang 'engaged' pemegang stake; (ii) jual beli tidak disertai dengan balasan yang mencukupi yang menyebabkan transaksi menjadi tidak boleh dilaksanakan, dan dengan kerana itu, syarikat harus mengembalikan milik tanah kepada responden dan gadaian juga harus dibatalkan; dan (iii) bank tidak boleh dipersalahkan dan tidak juga boleh dianggap sebagai cuai. Berasa tidak puas hati dengan keputusan, kedua-dua syarikat dan bank merayu.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Kedudukan seorang pemegang stake dalam suatu perjanjian jual beli adalah jelas. Pembeli, setelah mendeposit wang dengan pemegang stake, jika ia menukar fikiran, tidak boleh menuntut pemegang stake supaya mengembalikan wang tersebut kepadanya tanpa persetujuan penjual, untuk munafaat siapa wang tersebut didepositkan. Kedudukannya masih begitu walaupun pemegang stake tersebut dilantik oleh pembeli.

[2] Dalam kes ini, syarikat dan responden masing-masing telah bersetuju bahawa peguamcara bertindak sebagai pemegang stake walaupun peguamcara dipilih oleh syarikat. Dengan menyerahkan baki harga belian kepada pemegang stake, syarikat telah membuat segalanya yang perlu dibuat di sisi perjanjian. Syarikat, dalam kata lain, telah berlepas diri daripada baki harga belian dengan sepenuhnya kepada pemegang stake. Dengan itu, syarikat tiada kewajipan untuk mempastikan bahawa wang tersebut akan dibayar kepada responden.

[2a] Oleh itu, kerugian harus terletak di mana ianya jatuh di tangan responden. Adalah jelas bahawa remedi responden adalah terhadap pemegang stake. Hakim bijaksana dengan itu adalah silap bilamana memutuskan bahawa syarikat harus menanggung kerugian kerana merekalah yang memperkenalkan peguamcara kepada responden.

[3] Bank adalah pihak yang tak bersalah dan mereka dilindung oleh s. 340(1) Kanun Tanah Negara 1965. Kepentingan bank sebagai pemegang gadaian adalah 'indefeasible' kecuali jika wujud keterangan bahawa ada penipuan atau salah nyataan yang mereka ketahui, atau terdapat keadaan di mana gadaian didaftarkan secara palsu atau hakmilik atau kepentingan diperolehi secara tidak sah. Keterangan sebegitu tidak wujud.

Oleh Siti Norma Yaakob HMR

[1] Hujah bahawa oleh kerana pemegang stake adalah peguamcara syarikat maka syarikat seharusnya bertanggungan untuk mengganti kerugian adalah tidak tepat. Di sini kita tidak berurusan dengan perlantikan Messrs Francis Yong, Sulastry & Co selaku peguamcara syarikat, tetapi dengan perlantikan mereka sebagai pemegang stake, iaitu suatu perlantikan yang dipersetujui bersama oleh syarikat dan juga responden.

[2] Syarikat telah melaksanakan semua obligasinya di sisi perjanjian. Begitu juga responden telah menunaikan segala tanggungjawab mereka di sisi perjanjian, tetapi malangnya mereka tidak dibayar dengan penuh. Dalam halkeadaan sedemikian, responden mesti melihat kepada pemegang stake dan bukan kepada syarikat bagi menuntut kerugian yang dialami. Sebab pertama, pemegang stake bertanggungjawab di sisi undang-undang untuk membayar baki harga belian kepada responden sebaik sahaja pindahmilik dan gadaian ke atas tanah didaftarkan. Keduanya, syarikat tiada kewajipan untuk mempastikan bahawa responden akan menerima wang dari pemegang stake.

[3] Hakim bicara bijaksana telah tersalah arah akan dirinya apabila memerintahkan pengembalian pindahmilik tanah kepada responden. Persoalan balasan, samada tentang kecukupan balasan atau sebaliknya, jelas bukan suatu isu dan keputusan hakim bahawa perjanjian tidak boleh dilaksanakan sebenarnya tidak berbangkit langsung. Kesalahan terletak sepenuhnya kepada pemegang stake yang bukan merupakan pihak kepada perjanjian tetapi telah dilantik di bawah perjanjian untuk melakukan sesuatu yang mereka gagal melakukannya.

[4] Kedua-dua syarikat dan bank telah memperoleh hakmilik tak boleh disangkal kepada tanah berasaskan s. 340(1) Kanun Tanah Negara 1965, pihak terdahulu selaku pemilik berdaftar dan pihak terkemudian sebagai pemegang gadaian. Cara untuk hakmilik dan kepentingan ini dicabar hanyalah dengan responden menunjukkan halkeadaan-halkeadaan di dalam s. 340(2), hal mana akan menyebabkan hakmilik dan kepentingan sedemikian boleh disangkal. Ini gagal dilakukan oleh responden.

[Kedua-dua rayuan dibenarkan; perintah Mahkamah Tinggi diketepikan.]

Case(s) referred to:

Burt v. Claude Cousins & Co Ltd & Anor [1971] 2 QB 426 ***(refd)***
Glory Realty Co Pte Ltd v. Datuk Wong Chik Lim [1991] 3 MLJ 22 ***(foll)***
Grant v. O'Leavy [1955] 93 CLR 587 ***(foll)***
Kuldip Singh & Anor v. Lembaga Letrik & Anor [1983] 1 MLJ 256 ***(dist)***
Lee Yoke Chye v. Toh Thean Bok & Co [1987] 1 MLJ 122 ***(refd)***
Sorrel v. Finch [1977] AC 728 ***(refd)***

Thomson Hill Pte Ltd v. Chang Erth [1992] SLR 769 ***(foll)***
Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26 ***(refd)***

Legislation referred to:
National Land Code 1965, s. 340(1), (2)

Civil Appeal No: N-02-698-97
For the appellant - Elaine Ong Su Pei; M/s Shook Lin & Bok
For the respondent - Md Hisham Segaran (En Krishnamorthi with him); M/s Morthi Segaran & Co

Civil Appeal No: N-02-699-97
For the 1st appellant - Dato' Wong Seng Chow; M/s Wong Seng Chow, Nagarajah & Co
For the respondent - Md Hisham Segaran (En Krishnamorthi with him); M/s Morthi Segaran & Co

Reported by WA Sharif

JUDGMENT

Shaik Daud Ismail JCA:

Both the above appeals were heard together as they form the same transaction involving the purchaser, the vendors, the bank and solicitors over a purchase of lands.

The facts of the matter are not at all in dispute. Koh Guan Industries Sdn. Bhd. (the purchaser) entered into two sale and purchase agreements both dated 22 August 1994 (the agreements) with Lee Lee Fah, Fain Kee, Pan Soo Khyun, Pan Sek Kok, Pan Siew Ming and Pang Siew Kong (the vendors) whereby the vendors agreed to sell and the purchaser agreed to buy two pieces of land on lots 4012 and 813 in the Mukim of Rantau, Negeri Sembilan, at a purchase price of RM291,037.50.

Upon the execution of the agreements, the purchaser paid a deposit of RM29,103.75. By the terms of the agreements, the balance of the purchase price was to be paid on or before the completion date of the agreement, to the solicitors Messrs. Francis Yong, Sulastry & Co (the solicitors) as stakeholder. The purchaser had also applied for a loan in the sum of RM250,000 from OCBC Bank (M) Bhd. (the bank) and as security of the loan, the purchaser agreed to create two charges over the lands in favour of the bank. The purchaser had also settled the difference between the balance purchase price and the loan. Subsequently the bank's solicitors Messrs. Seah

Choon Chye had released the sum of RM250,000 to the solicitors upon presentation of the memorandum of transfer and charges over the lands. Accordingly on 30 November 1994, the solicitors had issued cheques in favour of the vendors. Unfortunately, however, upon presentation of the cheques by the vendors, the cheques were dishonoured with an endorsement "Account Closed". In other words the solicitors who acted as the stakeholder for the balance of the purchase price absconded with the money.

On the misdeed of the solicitors, two issues arise for the determination of the court *ie*,

(1) In view of the loss of the balance of purchase price, on whom should the burden of the loss fall?

(2) Whether the bank, as an innocent party, should be deprived of its rights as registered chargee in respect of the lands, in the circumstances stipulated in s. 340(2) of the National Land Code 1965.

The learned judge in the High Court was of the view and he so held that since the purchaser introduced the errant solicitor to the vendor, the purchaser should bear the burden of the loss. He entered judgment in favour of the vendors and ordered vacant possession to be restored to the vendors. The learned judge also dismissed the purchaser's counter-claim, and finally ordered the vendors to return the deposit to the bank to reduce the bank's burden. He also held that the bank being an innocent party ought not to be blamed.

It was argued before us that, it matters not who introduced or appointed the solicitor, since it is common ground that both parties agreed to the handing over of the balance of the purchase price to the particular solicitor. This is evidenced in the agreement itself in cl. 3 thereof where both parties agreed that the solicitor concerned be appointed as the stakeholder. The position of a stakeholder in a sale and purchase agreement was made clear by Lord Edmund Davies in *Sorrel v. Finch* [1977] AC 728 who repeated what was said in *Maloney v. Hardy* [1970] 216 EG 1582:

> The essence of stakeholding in vendor and purchaser cases is that a binding contract of the sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...

From this it can be seen that, the purchaser, having deposited the money with the stakeholder, if he changes his mind, cannot demand the stakeholder to hand over the money to him without the consent of the vendors for whose benefit it was deposited. This is so even if the stakeholder was appointed by the purchaser.

This position of the stakeholder was accepted and followed by our Supreme Court in *Toh Theam Hock v. Kemajuan Perwira Management Corp. Sdn. Bhd.* [1987] 2 CLJ 26; [1988] 1 MLJ 116 and in *Lee Yoke Chye v. Toh Thean Bok & Co.* [1987] 1 MLJ 122.

An almost similar situation arose in the Singapore case of *Thomson Hill Pte Ltd. v. Chang Erth & Anor. and Another Appeal* [1992] SLR 769. The appellants in the two appeals Thomson Hill Pte Ltd. and Glory Realty Co. Pte Ltd. (jointly referred to as "the appellants") were developers and vendors of two different immovable properties. The respondents, Dennis Chang and Datuk Wong Chik Lim (jointly referred to as "the respondents") were the respective purchasers of the appellants' properties and shared a common solicitor. The contract of sale and purchase in both instances followed the standard terms prescribed under the Singapore Housing Developers Rules 1976. Pursuant to cl. 3(1)(i), pending the issuance of the certificate of fitness for occupation, 5% of the purchase price payable within seven days after receipt of the certificate of fitness for occupation was held by the respondents' solicitor as stakeholder. The respondents' solicitor misappropriated the said sum and subsequently became a bankrupt. The respondents therefore were unable to pay the sum when the certificate of fitness were issued.

The issue before the court was whether the loss due to the misappropriation and subsequent bankruptcy of the stakeholder should fall on the appellants as vendors, or on the respondents as purchasers. The appellants argued that as the solicitor was appointed by the respondents, the respondents should bear the loss. Alternatively, the appellants argued that, on the basis of an implied term, the risk of the loss should be borne by both parties equally as neither party was at fault. The Singapore Court of Appeal held that:

> When the solicitor who is the stakeholder misappropriates the money, the loss must fall on the vendors **even though the solicitor was appointed by the purchasers.** This is because the true position in law that by mutual consent the parties have made the purchasers' solicitor the stakeholder. The fact that the particular solicitor was appointed by the purchasers as their solicitor was immaterial. The loss must be allowed to remain where it falls. The purchasers had done everything under the agreement to obtain title to the properties and there was no duty on the part of the purchasers to ensure that the vendors did receive the money from the stakeholder. The remedy of the vendors was to proceed against the stakeholder. (The emphasis is ours).

I agree with this statement of law. The Singapore Court of Appeal agreed and adopted this statement of law from the Australian High Court in *Grant v. O'Leavy* [1955] 93 CLR 587. In that case a similar situation arose as in our present appeal. The issue before the court was whether the purchasers or the

vendors should bear the loss of a sum of money placed in the hands of a stakeholder pending the completion of a contract. The court held that the correctness of the decisions depends on the question whether under the contract the purchasers had performed all the conditions precedent entitling them to a transfer of the land. The court rejected the proportion that until the money is in the hands of the vendors, the purchasers are not entitled to the transfer.

In the present case, both parties mutually agreed that the solicitor be made the stakeholder even though the solicitor was nominated by the purchaser. By handing over the balance of the purchase price to the stakeholder, the purchaser had done everything that needs to be done under the agreement. The purchaser had parted with the balance of the purchase price beyond recall to the stakeholder. Even if the purchaser changes its mind, the purchaser is in no position to recall the money from the stakeholder. Therefore the purchaser is under no duty to ensure that the money in the hands of the stakeholder was actually handed over to the vendors. In the normal course of events it would be handed over to the vendors. The loss must remain where it fell in the hands of the vendors. The vendors have sold the property for which they have not received the balance of the purchase price, therefore their remedy lies only against the stakeholder. (See also *Glory Realty Co. Pte. Ltd. v. Datuk Wong Chik Lim* [1991] 3 MLJ 22).

As for the bank, they are an innocent party and they are therefore protected by s. 340(1) of the National Land Code 1965. Their interest as chargee is indefeasible unless there are evidence to their knowledge that there was fraud or misrepresentation or where the registration of the charge was obtained by forgery or where the title or interest was unlawfully acquired. There are no such evidence adduced.

In the circumstances of this case, I am of the view that the learned judge erred in concluding that the purchaser must bear the loss simply because the purchaser introduced the solicitor to the vendors. Both the appeals were allowed with costs here and the court below, and the order of the High Court was set aside with an order that the deposit to be refunded to the appellant.

Siti Norma Yaakob JCA:

I have had the benefit of reading in draft the judgment of my brother, Shaik Daud Md. Ismail, JCA and although I agree with the conclusions stated therein, I wish to make the following additional remarks.

These two appeals that were heard together, raise the question as to which of two innocent persons is to suffer for the default of a third? The innocent parties are OCBC Bank (M) Bhd, (the bank), the appellant in Civil Appeal No. 698/97 and Koh Guan Industries Sdn. Bhd. (the company), the 1st

appellant in Civil Appeal No. 699/97, whilst the defaulter is Messrs. Francis Yong, Sulastry & Co., a firm of solicitors, who were appointed as stakeholders but are not cited as a party in these appeals. I need to mention here that although on record, the solicitors for the company were also the solicitors for the 2nd and 3rd appellants, directors of the company, in Civil Appeal No. 699/97, no submission was made on their behalf and I take it that both the 2nd and 3rd appellants were no longer interested in pursuing their appeals.

The facts leading to these appeals are not disputed and they have already been outlined in the judgment of my brother, Shaik Daud Md. Ismail, JCA. Perhaps I can do no better than to identify the status and roles played by the parties in this dispute following their contractual relationships pertaining to the sale and purchase of two lots of land (the lands) that were originally registered in the names of the six vendors, the respondents in both appeals.

As the purchaser, the company paid the 10% forfeitable deposits for the lands amounting to RM44,183.75 directly to the respondents pursuant to cl. 1 read together with s. 6 of the First Schedule to the two sale and purchase agreements, both dated 22 August 1994 (the agreements). The deposits were acknowledged to have been made by the company and received by the respondents upon the execution of the agreements. I also need to mention here that two identical sale and purchase agreements were executed as the transactions involved two lots of land, one registered in the names of the 1st, 2nd and 3rd respondents, and the other in the names of the 4th, 5th and 6th respondents.

The balance of the purchase price of the lands amounting to RM397,653.75 was to be settled by the company depositing that amount with the stakeholders on or before the agreed completion date which under cl. 2 read together with s. 8 of the First Schedule of the agreements was three months from the date of the agreements *ie*, on or before 22 November 1994, subject to an extension of one month *ie*, on or before 22 December 1994.

The company paid the balance of the purchase price by obtaining a loan of RM250,000 from the bank, who released the loan directly to the stakeholders on 24 November 1994. As the loan was not sufficient to settle the balance of the purchase price in full, the company made up the shortfall by depositing the amount of the shortfall directly to the stakeholders also on 24 November, 1994, an arrangement that had been agreed to pursuant to the Schedule of Payment referred to in cl. 3 of the agreements.

Clause 3 of the agreements also empowers the stakeholders to pay out the balance of the purchase price deposited with them to the respondents less any payments they have been authorised to make under cl. 4. That payment out was to be effected by the stakeholders upon the presentation of the Forms 14A executed by the company with the respondents and the presentation of fresh charges executed by the company in favour of the bank. It was upon the registrations of these documents that the stakeholders issued four cheques, all dated 30 November 1994 in favour of the respondents but all the cheques were dishonoured as the stakeholders' account had been closed.

In the meantime, the lands had already been registered in the name of the company and the charges in favour of the bank, these being the securities for the loan, but the respondents have not been paid in full for the lands. They have yet to receive the balance of the purchase price and since they consider that they have been cheated of the transaction, they filed separate suits against the company, two of its directors, the stakeholders and the bank seeking the following identical reliefs.

(1) A declaration that the agreements have been terminated.

(2) An order that the company and the bank transfer the lands to them free from any encumbrance.

(3) An order that the Registrar of Titles rectify the Register of Titles by naming them as the true registered owners of the lands and by cancelling the charges registered in favour of the bank.

(4) An order that the stakeholders pay the balance of the purchase price with interest at 10% per annum w.e.f. 22 November 1994.

(5) Exemplary and general damages against the company and its two directors.

(6) Costs.

Since two of the respondents had also caveated the lands, the company had also filed a separate suit against all the respondents seeking:

(1) an injunction restraining the respondents from interfering with the company's enjoyment of the lands by delivering vacant possession to the company.

(2) removal of the caveats lodged by the 2nd and 4th respondents.

(3) damages against all the respondents.

The three suits were consolidated and heard together at the end of which the High Court held that since the company had engaged the stakeholders to be their solicitors, the company is liable for the loss suffered by the respondents. The bank could not be faulted nor be held liable for negligence. Since there had been insufficient consideration for the sale, the transaction between the company and the respondents is illegal and cannot be enforced. On those findings, the High Court allowed the respondents' claims and ordered a retransfer of the lands from the company to the respondents. The company's claims against the respondents were dismissed and the deposits made by the company to the respondents inclusive of all accrued interests were however not refunded to the company but was instead ordered to be paid by the respondents to the bank to reduce the company's liability for the loan.

Before us, it was acknowledged that the recalcitrant party were the stakeholders who had absconded with the balance of the purchase price. What then, in law is the essence of a stakeholding? That question was asked and answered in the case of *Toh Theam Hock v. Kemajuan Perwira Management Corporation Sdn. Bhd.* [1987] 2 CLJ 26; [1988] 1 MLJ 116 where the then Supreme Court held that the "word "stake" is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. **The manner in which the money is to be disposed of depends on the terms on which it is held** (emphasis is mine).

I next ask what is the liability of a stakeholder? That question was also asked and answered by Lord Denning, M.R. in his dissenting judgment in the case of *Burt v. Claude Cousins & Co. Ltd. & Another* [1971] 2 QB 426 as follows:

> If an estate agent or a solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder," he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event.

This decision has been accepted with approval in our courts as seen from the cases of *Toh Theam Hock (supra)* and *Kuldip Singh & Anor v. Lembaga Letrik & Anor* [1983] 1 MLJ 256.

I next ask what rights, if any, can be asserted against the stakeholders, as the respondents have held them out to be the company's agents at the time they misappropriated the balance of the purchase price and under those circumstances, the company, as the principal, is liable to make good the loss suffered by the respondents, a contention that was upheld by the learned trial judge.

That contention, which I consider to be misplaced, stems from the fact that the stakeholders were the company's own solicitors, who prepared the agreements on the instructions of the company and were paid by the company for all legal work done in this transaction. That may well be so but I consider such appointment to be irrelevant and immaterial as that appointment relates to the appointment of Messrs. Francis Yong, Sulastry & Co. as the solicitors for the company, no more and no less. Here we are not concerned with that type of appointment but with an appointment in another capacity that of Messrs. Francis Yong, Sulastry & Co. as stakeholders, an appointment that is clearly spelt out by cl. 3 read together with the Schedule of Payment annexed to the agreements, and as such, an appointment that had been mutually agreed to by both the company and the respondents. Even the 5th respondent who testified on behalf of the other respondents admitted so when he was examined by his own solicitors at the trial.

It is this mutuality of appointment that singles out the instant appeals from the facts of the case of *Kuldip Singh & Anor v. Lembaga Letrik & Anor (supra)* based on somewhat similar circumstances and which was relied upon by the learned trial judge to hold that the company, as the purchaser, is liable to meet the respondents' losses.

In *Kuldip Singh* there was no express appointment of any stakeholder in the sale and purchase agreement. Wan Hamzah, J (as he then was) held that on the facts before him, he was of the opinion that the solicitors who acted for the purchasers and also received part of the purchase price on behalf of the vendor, held such money as stakeholders for a limited period *ie*, until the happening of two specific events, which he identified. On the happening of the two events, the solicitors ceased to hold the money as stakeholders and it was at this point of time that the money was appropriated. Additionally cl. 4 of the sale and purchase agreement specifies that any payment out of the money in the solicitors' possession was to be done by them in their capacity as the purchasers' solicitors. As such *Kuldip Singh's* case is distinguishable based on its own peculiar facts.

On the other hand, on the authorities of *Toh Theam Hock* and *Burt, (supra),* I hold that Messrs. Francis Yong, Sulastry & Co. as the stakeholders are legally bound to pay out the balance of the purchase price deposited with them to the respondents once the transfers and charges over the lands had been registered, the events that trigger their liability to pay out the balance of the purchase money in their hands. Such payment out was also the last act to complete the whole transaction in that the respondents would be paid in full for the purchase of the lands, the company would be the new registered proprietor of the lands and the bank's interests over the lands secured with

the registrations of the charges. In this instant, the respondents were denied their rights to the enjoyment of the balance of the purchase price as the stakeholders had absconded with the money and such loss must be borne by the stakeholders and no other person. The company had carried out all its obligations under the agreements by paying the 10% forfeitable deposits to the respondents under cl. 1, by depositing the balance of the purchase price partly from the loan granted by the bank and meeting the shortfall directly pursuant to the Schedule of Payment referred to in cl. 3 and lastly executing the transfer forms to register its titles to the lands and the charge forms to register the bank's interests as the chargee of the lands. Likewise the respondents had honoured their obligations under the agreements by executing Forms 14A that transferred the titles of the lands to the company, but unfortunately for them, they have not been paid in full and for such loss, the respondents must look to the stakeholders to account and not to the company, as the latter was under no duty to ensure that the respondents would receive the money from the stakeholders. The same situation arose in the Singapore case of *Thomson Hill Pte. Ltd v. Chang Erth* [1992] SLR 769 where the true position of the law was stated to be as follows.

> In our view, the true position in law is that by mutual consent the parties have made the purchaser-solicitor the stakeholder, and he is to hold the money to await the outcome of a certain event. The fact that the particular-solicitor, Philip Wong, was appointed by the purchaser as their solicitor is quite immaterial. The loss must be allowed to remain where it falls. There is no duty on the part of the purchasers to ensure that the vendors do receive the money from the stakeholder. The remedy of the vendors is to proceed against the stake holder.

In addition to being deprived of the balance of the purchase price, the respondents have also lost their titles to the land. In this respect the learned trial judge held that there had been insufficient consideration and as such the agreements could not be enforced. Based on this reasoning he ordered the respondents' *status quo* to be maintained in that there be a retransfer of the lands into the respondents' names free from any encumbrance by the cancellation of the charges in favour of the bank.

Here again the learned trial judge had misdirected himself. The question of consideration be it sufficient or otherwise coming from either the company or the respondents is not in issue as from the clear language of the agreements both the company and the respondents have agreed to provide sufficient consideration for the sale and purchase of the lands and they are in no way to be faulted in this respect. As I have indicated, they have each fulfilled their respective obligations under the agreements and the judge's finding that the agreements cannot be enforced does not arise at all. The fault all along lies with the stakeholders who were not parties to the agreements but have been appointed under the agreements to do a certain act which they had failed to do.

Both the company and the bank have acquired indefeasible titles and interests to the lands by virtue of s. 340(1) of the National Land Code 1965, the former as the registered proprietor and the latter as the chargee. That being the case, the only way the titles and interests can be impugned is for the respondents to establish any of the circumstances listed in sub-s. (2) of the same section to be present as to render such titles and interests defeasible. In this respect the respondents have pleaded fraud and/or insufficiency of instruments but a reading of the notes of proceedings shows that no evidence was led to prove either of those defences. The learned trial judge made no finding on this aspect of the case, no doubt guided by his conclusion that the company had to bear the loss suffered by the respondents. In any event the order to transfer the lands back to the respondents is clearly wrong and cannot be maintained. For that matter too, no cause of action is pleaded against the bank in the two suits brought by the respondents against it and the bank should not have been cited a party. To that end the trial judge's finding that the bank cannot be held liable for negligence is a misdirection as the plea of negligence was never pleaded against the bank in the first place.

For the reasons given in this judgment, both appeals were allowed, the orders of the High Court were set aside and the respondents ordered to pay the costs of proceedings both here and below to the appellants, the bank and the company. The deposits were also ordered to be refunded to them. Likewise the 10% forfeitable deposits made by the company to the respondents under the agreements should also be allowed to remain with the respondents as the latter were never at fault.

Mokhtar Sidin JCA:

I had the opportunity of reading the judgments of my learned brother Shaik Daud Md Ismail, JCA and my learned sister Siti Norma Yaakob, JCA in draft and concur with the reasonings and conclusion expressed by them. The appeals should be allowed with costs here and the court below